tion that the shares were at the institution of the action completely valueless. The claim of Haron in this earlier suit clearly included the claim in the third party action. We shall have to return to the pleadings on this earlier suit later and now turn to the events in this action.

In the event, Haron consented to judgment being entered against him by Seri Padu. With this judgment we are not concerned. Central Securities' application to set aside the third party notice was dismissed and Haron's application to sign final judgment as on an Order 14 application was allowed. Central Securities then appealed to this court and this court in a reserved judgment delivered on May 16, 1979 allowed the appeal from the final judgment entered and ordered the action to be consolidated with the earlier suit and tried together.

In this earlier action, Haron claimed for the rescission of the entire contract of sale of 1,400,000 shares on an allegation of fraud, which was particularised as a claim by Central Securities to be at all material times the beneficial owner of the shares, when in fact it was not. Haron appeared to claim that the ownership of the shares was a material particular as without it he would not have agreed to buy. He did not think that in a contract of sale, what was material was the ability of the vendor to deliver the goods agreed to be sold within the time limited or within such time as was reasonable in the circumstances when time was not of the essence. The defence however said it owned 1,002,000 shares which it had delivered to Haron, that it had contracted to purchase the remaining 398,000 shares and for that reason had described itself as the beneficial owner of the entire bundle of shares agreed to be sold and that subsequently it had entered into a supplemental agreement for the purchase of the 398,000 shares, to the knowledge of Haron. It alleged that it had delivered all the shares contracted to be sold but as was seen earlier, the shares delivered consisted of a script for 523,278 which could not be validly transferred to anybody but the named transferee. The fact remained however that this particular share certificate was for a greater part of the period between the acceptance and the claim in both actions registered in the name of Seri Padu and as the judgment of this court observed, required explanation in view of a letter from United Holdings refusing initially to register which would appear to contradict the assertion of Haron and Seri Padu that it only discovered this restricted transfer two years later and in view of the use made by Haron and Seri Padu to gain control of United Holdings: see the judgment of this court at pages 18-23. But it is also to be observed that at no time either had Central Securities ever offered any explanation how it came to sell share certificate No. 0227 without a valid transfer executed by the registered holder in blank or in the name of the purchasers or his nominee or nominees. All it relied on was that both Haron and Seri Padu, of which Haron was a director, had acted on it and both Seri Padu in the person of Koh Kim Chai, a director and Haron had been enabled to get on the board of directors of United Holdings and control the company and direct its operations from that time onwards.

In the circumstances shown in the affidavits, this court considered that the simple and uncomplicated view taken by the High Court of a delivery of the articles sold which the vendor had no title to pass was not justified and that triable issues had been raised and a defence on the merits shown which on well-established principles applicable to an Order 14 application entitled the respondent Central Securities to defend unconditionally. In the exercise of its discretion, this court also ordered a consolidation of this action with the earlier action. The judgment of the court also meant that the third party directions on Haron's application be issued and the claim of Haron against Central Securities proceed to trial after the relevant pre-trial procedures and documentation had been completed.

We need only to refer to the previous judgment of this court to show that this is not merely a case of a total failure of consideration. We do not consider that this is a fit case for appeal. In our view the evidence must be gone into and what the parties really require is an early date for trial. Mr. Sivalingam for Central Securities has expressed a desire for an early trial. The Chief Justice assures the parties that he will assist them in getting an early date.

The applications are dismissed with costs.

Applications dismissed.

Solicitors: *Ng Ek Teong & Partners; Mah Kok & Din.*

TAN HOCK CHAN v. KHO TECK SENG

[F.C. (Chang Min Tat F.J., Salleh Abas F.J. & Charles Ho J.) September 6 & November 3, 1979]

[Kuching — Federal Court Civil Appeal No. 129 of 1979]

Contract — Building Contract — Failure by owner to give effective possession — Breach of covenant — Right to rescind — Claim for quantum meruit.

In this case the respondent was a building contractor who was employed by the appellant to build 6 units of 3 storeyed shophouses at the agreed cost of $223,000. Payment for the construction was by progress payments dependent on the completion of the several stages of construction. The contractor completed 5 of the 6 shophouses. He put some work on the sixth shophouse but was unable to complete because of a claim by the occupier of the land to ground tenancy rights. The respondent claimed the balance of the contract price less the amount paid to him under the progress payments and also for extra work and materials supplied. The learned trial judge awarded the respondent $5,540 on a quantum meruit and $6,500 assessed as the reasonable profit which the contractor could expect to make on the one house. The appellant appealed.

Held: (1) by his failure to give effective possession of the lot for the sixth house, the appellant had broken his covenant and the respondent could rescind the contract;

(2) in this case the appellant had rescinded the contract when he served the writ and the statement of claim on the appellant;

(3) the claim for quantum meruit for work done and for cost of extras must succeed but the claim for loss of profits could not succeed.

Cases referred to:-

(1) *Larking* v. *Great Western (Nepean) Gravel Ltd.* (1940) 64 C.L.R. 221.

(2) *Carr* v. *J.A. Berriman Pty Ltd.* (1953-1954) 89 C.L.R. 327.
(3) *Ming & Co.* v. *Leong Ping Ching* [1964] M.L.J. 312.
(4) *Lodder* v. *Slowey* [1904] A.C. 442.

FEDERAL COURT.

Chew Pok Oi for the appellant.

Patrick Tan for the respondent.

Cur. Adv. Vult.

Chang Min Tat F.J. (delivering the judgment of the Court): The respondent (the contractor) was at all relevant times the building contractor employed by the appellant (the developer) to build 6 units of 3-storeyed shophouses at an agreed cost of $223,000.

The agreement between the parties is in writing. It is clear from the terms that the intention of the parties to the agreement was the construction of the project as a whole. The shophouses were not meant to be built one by one. The site was to be prepared in one operation and after its preparation, the piling work was to be commenced for all 6 houses. The construction was then to proceed by continuous work and the houses were expected to be constructed and ready for occupation at the same time. Thus the payment for the construction by the usual process of progress payments was made dependent upon the completion of the several stages of the entire construction as set out in the particular clause relating to the progress payments.

In the event, the contractor completed 5 of the 6 shophouses. He put in some work on the sixth shophouse which he was unable to complete because of a claim by a third party to ground tenancy rights to the lot on which this particular shophouse was to be built. The claim was reinforced by a court injunction which the contractor could not ignore. He also had carried out certain extra work for the employer. He therefore sued for his money, which he quantified at $59,000 being the balance of the whole contract sum of $223,000 less $164,000 previously paid to him and $12,562 for the extra work and materials supplied.

His statement of claim, it must be stated, was terse to the point of vagueness. It certainly ignored the fact that he did not complete the construction of the sixth shophouse. It assumed that he was entitled to the whole of the contract sum and it specifically relied on the provision in the agreement for final payment of a retention sum of $12,000 to be paid six months from the issue of the occupation permit. This period had expired at the taking out of the writ but this was only in respect of five of the six shophouses.

In paragraph 2 of the statement of defence, the developer stated that he did "not admit owing the plaintiff the sum of $71,562 or at all." This denial was followed immediately by these words "and subject the plaintiff to strict proof thereof." What is meant by these words is not easily discerned. The requirement of strict proof, which we believe occurs with monotonous regularity, is not one founded on the law of evidence as laid out in the Evidence Act, 1950.

Paragraph 3 of the defence reads:

"3. Alternatively, the defendant will say that the plaintiff completed only five (5) units of the shophouses. Accordingly, the contract price payable by the defendant to the plaintiff is $185,833, of which the defendant has on various dates paid the plaintiff the sum of $164,444.10 cts. A Statement of Account is annexed hereto and marked 'A'. Therefore, the defendant admits owing the plaintiff only the sum of $30,770.90 cts."

This particular defence in its turn completely ignored the work hitherto done on the sixth lot and the fact that the inability of the contractor to construct this last shophouse was not due to any fault or negligence on his part but was due solely to the failure on the part of the developer to give possession of the site which he had contracted to do in clause 5 of the agreement. It said that the contractor was only entitled to five-sixths of $223,000, that is to the sum of $185,833. The annexed statement of account claimed to having paid $164,000 and a set-off for 2 minor disbursements in the total sum of $444.10. It admitted extra works and charges in the amount of $9,382. On the striking of the balance, the defence therefore admitted owing $30,770.90.

Judgment for this sum of $30,770.90 was therefore signed in favour of the contractor, on the admissions in the defence and the case went on to trial on basically the contractor's claim to be paid the whole of the cost for the construction of the sixth shophouse and a claim of $3,280 for extra works and materials.

At the trial, the contractor sought to amend his statement of claim by a claim in the alternative for damages for breach of contract. The amendment was vehemently and successfully opposed by the contractor.

However despite this refusal to allow the amendment and admit a claim for damages for breach of contract, the learned trial judge entered judgment in favour of the contractor for $12,040 which he expressed in a note made by him as damages for breach of contract and $2,837 for extras with interest at 5% from the issue of the writ to date of judgment and costs. It is reasonably clear however from the written judgment that the award of $12,040 was made up of two sums, one of $5,540 on a quantum meruit, for the work done including work on the sixth lot and a sum of $6,500 which the learned judge assessed as the reasonable profit the contractor could expect to make on one house.

From this judgment, the developer appeals but not the contractor.

It is now necessary to advert to the agreement for the terms relevant to this appeal.

Clause 5 of the agreement is as follows:

"5. The Contractor hereby undertakes that he shall commence work on March 15, 1970 and deliver the said buildings to the Developer in a state of completion on November 15. 1970. Loss of time through inclement weather and public holidays shall be compensated upon the Contractor reporting the same to the Developer and the Developer agreeing to the same in writing."

For this contract to be operative, the contractor must be given access to the site of the construction at the latest on March 15, 1970, particularly as there is in the agreement a provision that time whenever specified shall be of the essence, and another provision for a penalty which is in these words:

"11. In the event of the Contractor being unable to complete the said buildings on the said date as stipulated in Clause

5 hereof he shall compensate the Developer with a sum of $800 (Dollars Eight Hundred Only) per month or part thereof for each and every successive month that the delay in completion of the said buildings continues."

However, by a clause subsequently added to the agreement, the parties provided for the interference and delay caused by the presence of squatters on the site in these terms:

"2. In the event of the squatters at present in occupation of Lot 2 and Lot 7 of the building site being unwilling or unable to vacate and remove from the building site and obstruct the progress of the construction work then the parties hereto agree that an extension of time shall be given to the Contractor to complete the said buildings subject to the mutual agreement between the parties hereto as to the duration or the additional period."

Lot 2 was the relevant lot. It is more properly Lot 216.

The squatter or squatters on Lot 7 made no appreciable difficulties but there was a squatter on Lot 2 or Lot 216 who was of sterner stuff. He not only sued out a writ but he also applied *ex parte* for and obtained an injunction in the action restraining the developer and his contractor from entering on Lot 216, thereby effectively putting a stop to any work on this lot. This was on April 26, 1971, immediately after it was obvious to him that the developer had given or was attempting to give the site to the contractor for the buildings to be erected thereon. We have not been told whether the developer made any attempt at setting aside this ex parte injunction but it would appear from the absence of any mention of such an attempt, he did not do so. During the currency of the injunction, the contractor through no fault of his own but through the inability of the developer, was therefore unable to carry out the construction on this lot.

To continue with the narration in respect of this recalcitrant squatter, his action was on January 12, 1973 dismissed for want of prosecution. With the dismissal of his action, the injunction was dissolved, but by then, the damage had already been done and the contractor had commenced the present action. To carry on the story a little further, though no longer armed with an effective order of court, this particular squatter was so obstructive that the developer could not by himself or by any other contractor enter into possession of the site and complete the building. It was not until well into 1977, that he thought of commencing an action against the squatter and obtaining himself an injunction against the squatter. Only then could he engage another contractor to build and then sell the house after it had been built.

The learned trial judge treated this case very much as a case of implied repudiation of the agreement by the developer insofar as Lot 216 was concerned arising from the injunction obtained by the squatter on April 26, 1971. At the appeal before us, criticism was levied against this finding.

But it seems to us that by his failure to give effective possession of Lot 216 to the contractor, whatever the reason, the developer has not repudiated the contract but has only broken his convenant, as pointed out by Dixon J. in *Larking* v. *Great Western (Nepean) Gravel Ltd.*[1]:

"If a covenantor undertakes that he will do a definite act and omits to do it within the time allowed for the purpose, he has broken his covenant finally and his continued failure to do the act is nothing but a failure to remedy his past breach and not the commission of any further breach of his covenant. On the other hand, the effect of the builder's election not to rescind was to leave it open to the building owner to remedy his breach. If he did remedy it, the builder would be bound to accept the late performance, though entitled, of course, to sue for any damage suffered by him through the delay."

Where a party is in breach of his covenant, particularly a covenant so essential to the performance of the contract as the one in this case for giving possession of the site, the other party to the contract may rescind the contract and he does so, ordinarily, by giving notice of his intention to do so. His right to do so arises immediately where time is or is made the essence and the time has passed.

In the judgment of the High Court of Australia delivered by Fullagar J. in *Carr* v. *J.A. Berriman Pty. Ltd.*[2] at pages 348-349 there occurs this passage:

"Where a contract contains a promise to do a particular thing on or before a specified day, time may or may not be of the essence of the promise. If time is of the essence, and the promise is not performed on the day, the promisee is entitled to rescind the contract, but he may elect not to exercise this right, and an election will be inferred from any conduct which is consistent only with the continued existence of the contract. If time is not of the essence of the promise, the promisee is not entitled to rescind for non-performance on the day. If either (a) time is not originally of the essence, or (b) time being originally of the essence, the right to rescind for non-performance on the day is lost by election, the promisee can, generally speaking, only rescind after he has given a notice requiring performance within a specified reasonable time and after non-compliance with that notice; see e.g., *Taylor* v. *Brown* 48 E.R. 1149; *Stickney* v. *Keeble* [1915] A.C. 384; *Panoutsos* v. *Raymond Hadley Corporation of New York* [1917] 2 K.B. 473."

No evidence had been adduced in this case that the contractor had given notice of his intention to rescind the contract for failure on the part of the developer to give him possession of the site, so unless there was conduct on the part of the contractor evincing such an intention to rescind, he had no cause of action, but must treat the contract as still subsisting, particularly having regard to the effect of the additional clause (2) reproduced above. But for ourselves we consider that there was such a notice of rescission when the contractor served the writ and statement of claim herein on the developer and that by his statement of defence, the developer had accepted such a notice as effectively terminating the contract between the parties.

This contract is clearly not a lump sum contract, in view of the provision for progress payments: *Ming & Co.* v. *Leong Ping Ching.*[3] The contractor had however claimed under a lump sum or entire contract. This on a proper construction of the contract must be regretted. However the defence had not relied on any contention that a claim under a lump sum contract was not maintainable. The case was fought out on the basis of a claim for *quantum meruit* on a contract which was not for a lump sum. The claim therefore for work done and for the cost of extras must succeed. But on a *quantum meruit*, the claim which was allowed for loss of profits cannot succeed and to this extent the appeal is allowed.

In *Lodder* v. *Slowey*,[4] the contract was to construct a tunnel and other works and the builder was

prevented from completing. On appeal, it was held that the proper measure of damages for the builder was the actual value of the work and materials, the court considering it immaterial whether the builder, had he been allowed to complete, would have made a profit (or loss). In delivering the judgment of their Lordships of the Privy Council, Lord Dalvey said at page 453: "Their Lordships also agree ... as to the proper measure of damages or (more accurately) as to the right of the respondent (builder) to treat the contract as at an end and sue for work and labour done instead of suing for damages for breach of the contract."

The judgment for the contractor is therefore varied by reducing the sum of $14,877 awarded by the $6,500 given for loss of profits.

On a question of costs, both parties have contributed to the confusion in the High Court and the proper order seems to us to be that the order of costs in the High Court shall stand but that each party bears his own cost at the appeal. We so order.

Order accordingly.

Solicitors: *Chan, Jugah, Wan Ullok & Co.; Yong & Co.*

KENDERAAN BAS MARA v. YEW BON TEW & ANOR.

[F.C. (Raja Azlan Shah C.J. (Malaya), Chang Min Tat & Syed Othman F.JJ.) November 27, 1979]

[Kuala Lumpur — Federal Court Civil Appeal No. 93 of 1977]

Practice and Procedure — Limitation — Action barred by limitation — Time enlarged by amending statute after action was barred — Whether statute retroactive in its application — Public Authorities Protection Act, 1948 — Public Authorities Protection (Amendment) Act, 1974.

Interpretation — Statutes — Whether retroactive — Whether affecting accrued rights — Public Authorities Protection (Amendment) Act, 1974 — Interpretation Act, 1967, s. 30(1)(b).

In this case the respondents in March 1975 brought an action for damages for personal injuries sustained by both of them in a motor accident that took place in April 1972. Section 2(a) of the Public Authorities Protection Act, 1948 provided that action shall not lie or be instituted unless it is commenced within twelve months next after the act complained of. With effect from June 1974, this provision was amended to substitute "thirty-six months" for the "twelve months'. The question was whether the amending act had retroactive effect so as to enable the respondents to bring their action.

Held: the time for the claim in this case was not enlarged by the amending Act. The Act was not retroactive in operation and had no application to a cause of action which was barred before the Act came into operation.

Cases referred to:-

(1) *The Ydun* [1899] P. 236, C.A.
(2) *Maxwell* v. *Murphy* (1957) 96 C.L.R. 261.
(3) *Rex* v. *Chandra Dharma* [1905] 2 K.B. 335.
(4) *Hamilton Gell* v. *White* [1922] 2 K.B. 422.
(5) *Director of Public Works* v. *Ho Po Sang* [1961] 2 All E.R. 721.
(6) *Free Lanka Insurance Co. Ltd.* v. *Ranasinghe* [1964] 1 All E.R. 457.
(7) *J.S. Drinkhall* v. *Nam Hue Motor Hiring* [1955] M.L.J. 119.
(8) *Raman Kurup* v. *Chappan Nair* A.I.R. 1918 Mad. 86.
(9) *Appasami Odayar* v. *Subramanya Odayar* (1888) L.R. 15 I.A. 167.

FEDERAL COURT.

Zainur Zakaria for the appellants.

K.C. Cheah for the respondents.

Cur. Adv. Vult.

Raja Azlan Shah C.J. (Malaya) (delivering the judgment of the Court): Paragraph (a) of section 2 of the Public Authorities Protection Act, 1948 which provided that action shall not lie or be instituted "unless it is commenced within twelve months next after the act complained of," was amended with effect from June 1974 by section 2 of the Public Authorities Protection (Amendment) Act, 1974 (Act A252) by the deletion of the words "twelve months" wherever appearing in paragraph (a) of section 2 and substituting therefor the words "thirty-six months".

In March 1975 the respondents brought an action for damages for personal injuries sustained by both of them in a motor accident that took place in April 1972.

The question for decision in this appeal is whether the claim which was commenced after the expiry of the twelve months for bringing the action and therefore barred could be revived by the extended period of thirty-six months in the Act. The learned judge expressed a view to which we are not prepared to subscribe. He answered the question in the affirmative. It is necessary to quote *in extenso* his reasoning:

"But the writ is issued after amendment when the period of limitation has been increased from twelve to thirty-six months. The writ is filed within thirty-six months from date of accident. Since the amending Act is purely procedural and therefore retrospective, the limitation law applicable when the writ was issued on March 20, 1975, is the amended Public Authorities Protection Act, and since the period of thirty-six months has not lapsed from the date of accident, I hold that the claim is not time-barred."

The pertinent question for determination is the nature of Act A252 — does it affect rights or procedure. An act which makes alteration in procedure only is retrospective: see *The Ydun.*[1]

In our view there are no cases upon which differences of opinion may more readily be entertained, or which are more embarrassing to dispose of, than the cases where the court has to decide whether or not an amending statute affects procedure and consequently will operate retrospectively or affects substantive rights and therefore in the absence of a clear contrary intention, should not be read as acting retrospectively. The distinction between procedural matters and substantive rights must often be of great fineness. Each case therefore must be looked at subjectively; there will inevitably be some matters that are classified as being concerned with substantive rights which at first sight must be considered procedural and vice versa.

The Ydun, supra, was quoted to support the argument that Act A252 is procedural. In our opinion that case proceeded on the basis that it was one of procedure only. On the date of issue of the writ (November 14, 1898) the law in force was the Public Authorities Protection Act, 1893 (effective date January